

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SUMMIT CARBON SOLUTIONS, LLC, Petitioner, v. IOWA UTILITIES BOARD, Respondent.	CASE NO. CVCV062900 REPLY TO RESISTANCE TO MOTION FOR SUMMARY JUDGMENT
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COMES NOW the Office of Consumer Advocate (OCA) a division of the Iowa Department of Justice and herby submits this Reply to the Resistance to Sierra Club's Motion for Summary Judgment (Resistance) filed by Summit Carbon Solutions, LLC (Summit) on May 12, 2022.

INTRODUCTION

On February 11, 2022, the Court issued an Order Granting Motion for Temporary Injunction (Order) in this docket, preventing Sierra Club Iowa Chapter (Sierra Club) from obtaining a list of potentially impacted landowners provided by Summit to the Iowa Utilities Board (IUB or Board) in IUB Docket HLP-2021-0001, in which Summit is seeking to construct a hazardous liquid pipeline to transport carbon dioxide. Sierra Club requested a copy of the landowner list pursuant to Iowa Code Chapter 22, the Open Records Act. The Order limited the issue remaining for consideration of a permanent injunction to the question of whether the landowner list falls under the exception in Iowa Code § 22.7(18), which excludes the following information from open record requirements:

“Communications not required by law, rule, procedure, or contract, that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination.”

Specifically, the Order identified the question of whether the landowner list was a communication that was “required by law, rule, procedure, or contract.” (Order at 4).

On March 21, 2022, Sierra Club filed a Motion for Summary Judgment (Motion), in which it argued that there is no factual dispute about the question of whether the landowner list was a communication that was “required by law, rule, procedure, or contract” and urged the Court to grant summary judgment and deny Summit’s request for a permanent injunction. Sierra Club included a Statement of Uncontested Facts with the Motion and argued that those allegedly uncontested facts support the Motion for Summary Judgment.

On April 5, 2022, Summit filed a Motion for a Continuance, requesting additional time to conduct discovery related to facts contained in Sierra Club’s Motion. On April 22, 2022, this Court granted a continuance and established a procedural schedule related to the Motion for Summary Judgment. On May 12, 2022, Summit filed its Resistance to Sierra Club’s Motion for Summary Judgment.

For the reasons stated below, OCA urges the Court to grant Sierra Club’s Motion.

ARGUMENT

Summit opposes Sierra Club’s Motion for Summary Judgment by casually inserting requirements for “procedure” that have no basis in law. As explained in OCA’s April 5, 2022

Response to Sierra Club’s Motion, Iowa Code § 474.3 provides the Board with broad authority to implement procedures: “The utilities board may in all cases conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice.” More specifically, Iowa Code section 479B.1 states, “It is the purpose of the general assembly in enacting this law to grant the utilities board the authority to implement certain controls over hazardous liquid pipelines.” Included in the controls over which the Board has authority is Iowa Code § 479B.4(4) requiring that companies seeking to build a hazardous liquid pipeline, “give notice of the informational meeting to each landowner affected by the proposed project and each person in possession of or residing on the property.”

The Board’s December 16, 2021 “Order Regarding Filing Requirements and Addressing Survey Timing” stated, “The Board therefore requires pipeline companies to file a mailing list for each county where the pipeline is proposed to be located.” (Sierra Club App at 3). Summit contends that the December 16, 2021 Board Order cannot serve as the basis for granting summary judgment, because it was issued after Summit provided the Board with the landowner list. (Resistance Brief at 5). However, a review of the language of the Board’s Order reveals that it was not announcing a new procedure, but merely stating existing procedure for the record. The use of the present tense – “the Board therefore requires” – indicates that the procedure being explained is not a new procedure, but a pre-existing procedure. There is no language suggesting that this is a different procedure than existed in the past, nor that the Order announces a change in procedure. The December 16, 2021 Board Order is therefore merely a statement of a pre-existing procedural requirement.

Even if the December 16, 2021 Board Order is considered to be after-the-fact, Board procedure clearly required Summit to provide the Board with the landowner list. This procedure is acknowledged in Summit's "Motion for Temporary/Preliminary Injunction," where Summit stated, "Board staff requested that Summit file the mailing lists it used to provide notices." (Motion for Temporary/Preliminary Injunction at 3). When the Board requests that a party provide the Board with certain information during a proceeding, that party cannot simply refuse the Board's request. In its effort to deny the existence of a procedure requiring Summit to provide the landowner list to the Board, Summit describes its provision of the landowner list to the Board as "voluntary." (Resistance Brief at 1). However, Summit's attempt to portray its provision of the list as voluntary must be rejected. A voluntary act is by definition an act that is done without an obligation to do so. The inability a party to refuse a Board request for information means that the response cannot be voluntary.

Summit also attempts to casually insert legal requirements about the term "procedure" that simply have no basis in law. Iowa Code § 22.7(18) contains no requirement supporting Summit's assertion that it "should be read to require some formality of structure and consistency of operation." (Resistance Brief at 6). To the contrary, Iowa Code § 474.3 provides that the Board may "conduct its proceedings" in any manner the Board deems appropriate, as long as it is not prohibited by law. Proceedings are conducted through procedure. The negative prohibition against conducting proceedings in a manner prohibited by law means that the Board's procedural authority includes any procedure not prohibited by law, with no limitations as to the source of the procedure. The Board's authority to enforce Chapter 479B – Hazardous Liquid Pipelines and Storage Facilities – must inherently include the ability to obtain information demonstrating a company's compliance, even in the absence of a specific written procedure. The Board can only

enforce the requirement under 479B that a company wishing to build a hazardous liquid pipeline provide notice to landowners if the Board has the authority to require companies to provide relevant information, such as a list of people who were served. Requiring the Board to have a specific written procedure for every piece of information it might request in any of the Iowa Code Chapters that it enforces would be both overly burdensome and unnecessary. The only reasonable interpretation of the Board's authority is that the Board can implement procedures necessary to exercise its authority as the need arises.

Finally, Summit includes factual assertions about multiple types of proceedings. (Resistance Brief at 3-5). While there may be similarities between the types of proceedings, hazardous liquid pipelines are inherently different than transmission lines, or even natural gas pipelines. The law regarding hazardous liquid pipelines is contained in its own chapter of the Iowa Code – Chapter 479B – precisely because it is not to be treated identically to other linear infrastructure projects, such as natural gas pipelines or transmission lines. The existence, or lack thereof, of similar procedures in proceedings involving other types of linear infrastructure does not speak to the existence of a specific procedure in proceedings involving hazardous liquid pipelines.

There is also great variety in the number of miles of linear infrastructure being constructed in different proceedings, and thus the number of potentially impacted landowners. The Board may not need a landowner list to verify compliance with mailing for a 20-mile transmission line. On the other hand, when, as is the case here, the list of potentially impacted landowners and tenants includes over 15,000 records for parcels in the proposed pipeline corridor, it is undoubtedly necessary for the Board to obtain a copy of the list to confirm compliance with Iowa law. (Declaration of Jake Ketzner, attached to Petition for Temporary and

Permanent Injunctive Relief, December 14, 2021). Summit's observations about other proceedings therefore do not speak to procedure the Board may require in the present case.

CONCLUSION

For the reasons stated above, OCA respectfully requests that this Court grant Sierra Club's Motion for Summary Judgment.

Respectfully submitted,

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OFFICE OF CONSUMER ADVOCATE

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2022, the foregoing document was filed with the Clerk of Court using the EDMS system which will send electronic notice of the filing to the parties of record.

/s/ Anna K. Ryon

Anna K. Ryon